Pemungut Duti Setem Malaysia v Perbadanan Pembangunan Pulau Pinang

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-01(NCvC)(A)-809–12 OF 2021
AZIZAH NAWAWI, NANTHA BALAN AND GUNALAN MUNIANDY JJCA
13 MAY 2024

Revenue Law — Stamp duty — Remission order — Loan facility obtained by state entity — Condition precedent for loan application — Requirement for state entity to submit letter of undertaking from State Government to bank — Whether letter of undertaking served as 'security' — Whether 'security' included undertaking and guarantee provided by third party — Whether meaning of 'security' in Remission Order ought to be given wide interpretation — Whether letter of undertaking a separate instrument — Accountability of State Government towards loan facility provided to state entity — Whether letter of undertaking amounted to assurance that State Government took full responsibility for loan amount

The respondent, a state entity was also a corporation established under the Incorporation (State Legislatures Competency) Act 1962 and the Penang Development Corporation Enactment 1971 (PDC Enactment). Section 15C of the PDC Enactment stipulated that the respondent could not apply for any loans except with prior written approval from the Minister of Finance ('MOF'), and the MOF may impose any conditions deemed necessary on such approval. According to the MOF directive issued under para 14(1)(d) of the Second Schedule of the Incorporation (State Legislatures Competency) Act 1962, the State Government must provide an undertaking that it would fully guarantee the loan obtained by a State entity. Accordingly, the respondent applied for and had obtained an Islamic Tawarruq Banking facility of RM100m ('loan') from Bank Islam Malaysia Bhd ('bank'). Additionally, in the Murabahah Financing Agreement, there was also a specific requirement to provide a guarantee to secure the said loan, to be provided by a third party, namely the Penang State Government. Pursuant to the terms of the letter of offer issued by the bank, the respondent was required to submit a letter of undertaking ('LOU') from the Penang State Government to the MOF stating that the State Government would be responsible for the financing facility offered by the bank. Subsequently, the Penang State Government, through the State Government Executive Council Meeting had agreed to approve the proposal of the loan facility amounting to RM100m from the bank to the respondent. Following that, an LOU was sent by the Penang State Finance Department to the MOF stating that the State Government pledged to fully

guarantee the loan facility of RM100m from the bank. Upon compliance with the terms of the offer letter from the bank, including the issuance of LOU by the Penang State Finance Department, a Murabahah Financing Agreement was signed by the respondent and the bank. On the same day, the respondent applied for stamp duty remission from the appellant on the Murabahah Financing Agreement in accordance with the Stamp Duty (Remission) (No 2) Order 2012 ('Remission Order'). However, the application for the remission of stamp duty chargeable was rejected by the appellant. The respondent, in response, submitted further explanation to the appellant, elucidating, inter alia: (a) the financing facility amounting to RM100m was an unsecured financing; (b) repayment of the financing facility was made in a lump sum; and (c) the duty imposed on the Murabahah Financing Agreement was in accordance with item 22(1)(b) of the First Schedule of the Stamp Act 1949 ('Stamp Act'). After considering the respondent's explanation, the appellant maintained the stance of not allowing the stamp duty remission application requested by the respondent. Therefore, the appellant issued a security estimation notice (ad valorem duty), regarding the Murabahah Financing Agreement ('ad valorem estimation notice'). The respondent then commenced an appeal under s 39 of the Stamp Act 1949 to the High Court. The High Court judge ('HCJ') held that the LOU was not a 'security' and the facility agreement was entitled for the remission of stamp duty under the Remission Order. Aggrieved with the said decision, the appellant appealed.

Held, allowing the appeal, setting aside the decision of High Court:

(1) The word 'security' must be given a wide meaning. Under the Third Schedule, the Conditions Precedent (which to be taken and construed as an integral part of this agreement), para D provided that the security for the loan was the LOU from the Penang State Government via Jabatan Kewangan Negeri to Ministry of Finance that the State Government was to be accountable for the facility of RM100m with the bank. Therefore, despite the respondent's reliance on both the letter of offer and the facilities agreement stating 'Security: Nil', both documents must be read as a whole. Accordingly, considering both documents as a whole, the conditions precedent of the letter of offer and para (D)(1) of the Third Schedule to the facility agreement clearly stated the requirement of the LOU issued by Penang State Government via the Jabatan Kewangan Negeri to MOF that the State Government was to be accountable for the facility of RM100m with the bank (see paras 38 & 40–41).

(2) For the purposes of the Remission Order, there must be a separate instrument that created an obligation 'for any sum or sums of money repayable on demand or in single bullet repayment'. And the intent and purpose of that separate instrument must be ascertained whether it fell within the ambit of the Remission Order. Hence, the LOU issued by the Penang State Government to the MOF was a separate instrument that

served as a clear assurance that the State Government would take full responsibility for the loan amount (see paras 44–45).

(3) The intent and purpose of the LOU was the Penang State Government's undertaking to be responsible for the loan and it explicitly secured the repayment of the loan facility to the bank. As a result of this assurance provided to the MOF, the payment of the RM100m facility was guaranteed by the State Government. Additionally, the LOU provided a guarantee to the bank that the respondent had the capability to repay the loan amount at all times. Thus, the LOU served as security for the facility agreement in multiple ways (see para 46).

(4) Even though the LOU was a letter between the Penang State Government and the MOF, it explicitly guaranteed the entire RM100m loan provided by the bank to the respondent. The LOU from the Penang State Government provided an exceptional security and a complete assurance for the repayment of the loan amount. The State Government bore full responsibility for the loan amount, and as such, ensured that agencies under its jurisdiction, such as the respondent, maintain strong financial capability at all times to enable the repayment of the loan amount to the bank (see para 47).

(5) The facility agreement was secured by the LOU issued by the State Government to the MOF. The bank was a Federal Government GLC, whilst the respondent was a State entity. Hence, the relationship between the bank and the respondent was not strictly commercial, but were guided by Government policies. Therefore, instead of the usual security in the nature of mortgages or charges, the letter of offer issued by the bank specified the requirement of a LOU from the State Government, in compliance with the Federal Government policy. This was also clearly stated in the Third Schedule of the facilities agreement (see para 49).

(6) As the LOU issued by the State Government constituted a security for the said RM100m loan. The HCJ had erred in law in concluding that a 'security' was limited to instruments which form an encumbrance on property which the lender could rely on for the purpose of securing the repayment of a debt. The HCJ failed to appreciate that the word 'security' in the Remission Order had a wider meaning where it also included the undertaking and guarantee provided by a third party. Therefore, since the loan instrument was secured by the Penang State Government's LOU, it did not fall within the Remission Order (see para 50).

[Bahasa Malaysia summary

Responden, sebuah entiti negeri juga merupakan sebuah perbadanan yang ditubuhkan di bawah Akta Pemerbadanan (Kekompetenan Badan Perundangan Negeri) 1962 dan Enakmen Perbadanan Pembangunan Pulau Pinang 1971 (Enakmen PDC). Seksyen 15C Enakmen PDC menetapkan

bahawa responden tidak boleh memohon sebarang pinjaman kecuali dengan kelulusan bertulis terlebih dahulu daripada Menteri Kewangan ('MOF'), dan MOF boleh mengenakan sebarang syarat yang difikirkan perlu ke atas kelulusan tersebut. Menurut arahan MOF yang dikeluarkan di bawah perenggan 14(1)(d) Jadual Kedua Akta Pemerbadanan (Kekompetenan Badan Perundangan Negeri) 1962, Kerajaan Negeri mesti menyediakan akujanji bahawa ia akan menjamin sepenuhnya pinjaman yang diperoleh oleh entiti Negeri. Sehubungan itu, responden memohon dan telah memperoleh kemudahan perbankan Tawarruq Islam sebanyak RM100 juta ('pinjaman') daripada Bank Islam Malaysia Bhd ('bank'). Di samping itu, dalam Perjanjian Pembiayaan Murabahah, terdapat juga keperluan khusus untuk menyediakan jaminan bagi mendapatkan pinjaman tersebut, yang akan disediakan oleh pihak ketiga, iaitu Kerajaan Negeri Pulau Pinang. Mengikut syarat-syarat surat tawaran yang dikeluarkan oleh bank, responden dikehendaki mengemukakan surat akujanji ('LOU') daripada Kerajaan Negeri Pulau Pinang kepada MOF yang menyatakan bahawa Kerajaan Negeri akan bertanggungjawab ke atas kemudahan pembiayaan yang ditawarkan oleh pihak bank. Selepas itu, Kerajaan Negeri Pulau Pinang melalui Mesyuarat Majlis Kerajaan Negeri telah bersetuju untuk meluluskan cadangan kemudahan pinjaman berjumlah RM100 juta daripada bank kepada responden. Susulan itu, LOU telah diserahkan oleh Jabatan Kewangan Negeri Pulau Pinang kepada MOF yang menyatakan bahawa Kerajaan Negeri berakujanji untuk menjamin sepenuhnya kemudahan pinjaman sebanyak RM100 juta daripada bank itu. Setelah mematuhi syarat-syarat surat tawaran daripada bank, termasuk pengeluaran LOU oleh Jabatan Kewangan Negeri Pulau Pinang, satu Perjanjian Pembiayaan Murabahah telah ditandatangani oleh responden dan pihak bank. Pada hari yang sama, responden memohon pelepasan duti setem daripada perayu ke atas Perjanjian Pembiayaan Murabahah selaras dengan Perintah Duti Setem (Peremitan) (No 2) 2012 ('Perintah Peremitan'). Walau bagaimanapun, permohonan untuk pelepasan duti setem yang boleh dikenakan telah ditolak oleh perayu. Responden, sebagai balasan, mengemukakan penjelasan lanjut kepada perayu, menjelaskan, antara lain: (a)kemudahan pembiayaan berjumlah RM100 juta adalah pembiayaan tidak bercagar; (b) pembayaran balik kemudahan pembiayaan dibuat secara sekaligus; dan (c) duti yang dikenakan ke atas Perjanjian Pembiayaan Murabahah adalah mengikut butiran 22(1)(b) Jadual Pertama Akta Setem 1949 ('Akta Setem'). Selepas mempertimbangkan penjelasan responden, perayu mengekalkan pendirian tidak membenarkan permohonan pelepasan duti setem yang diminta oleh responden. Oleh itu, perayu mengeluarkan notis anggaran sekuritu (duti ad valorem), berkenaan Perjanjian Pembiayaan Murabahah ('notis anggaran ad valorem'). Responden kemudiannya memulakan rayuan di bawah s 39 Akta Setem 1949 ke Mahkamah Tinggi. Hakim Mahkamah Tinggi ('HMT') memutuskan bahawa LOU bukanlah 'sekuriti' dan perjanjian kemudahan itu berhak untuk pelepasan duti setem di

bawah perintah peremitan. Terkilan dengan keputusan tersebut, perayu merayu. A

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi:

B

(1) Perkataan 'sekuriti' mesti diberi pengertian yang luas. Di bawah Jadual Ketiga, Syarat Duluan (yang perlu diambil dan ditafsirkan sebagai bahagian penting perjanjian ini), perenggan D menyatakan bahawa sekuriti untuk pinjaman itu adalah LOU daripada Kerajaan Negeri Pulau Pinang melalui Jabatan Kewangan Negeri kepada Kementerian Kewangan bahawa Kerajaan Negeri akan bertanggungjawab untuk kemudahan RM100 juta dengan bank. Oleh itu, walaupun responden bergantung kepada kedua-dua surat tawaran dan perjanjian kemudahan yang menyatakan 'Sekuriti: Tiada', kedua-dua dokumen mesti dibaca secara keseluruhan. Sehubungan itu, mengambilkira kedua-dua dokumen secara keseluruhan, syarat-syarat duluan surat tawaran dan perenggan (D)(1) Jadual Ketiga kepada perjanjian kemudahan menyatakan dengan jelas keperluan LOU yang dikeluarkan oleh Kerajaan Negeri Pulau Pinang melalui Jabatan Kewangan Negeri kepada MOF bahawa Kerajaan Negeri bertanggungjawab untuk kemudahan RM100 juta dengan bank (lihat perenggan 38 & 40–41).

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(2) Untuk tujuan perintah peremitan, mesti ada instrumen berasingan yang mewujudkan obligasi 'untuk sebarang jumlah atau jumlah wang yang perlu dibayar balik atas permintaan atau dalam pembayaran semula sekaligus'. Dan niat dan tujuan instrumen berasingan itu mesti dipastikan sama ada ia termasuk dalam lingkungan perintah perimitan. Oleh itu, LOU yang dikeluarkan oleh Kerajaan Negeri Pulau Pinang kepada MOF adalah instrumen berasingan yang menjadi jaminan jelas bahawa Kerajaan Negeri akan bertanggungjawab sepenuhnya ke atas jumlah pinjaman (lihat perenggan 44–45).

F

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(3) Hasrat dan tujuan LOU adalah akujanji Kerajaan Negeri Pulau Pinang untuk bertanggungjawab ke atas pinjaman dan ia secara jelas menjamin pembayaran balik kemudahan pinjaman kepada bank. Hasil daripada jaminan yang diberikan kepada MOF, pembayaran kemudahan RM100 juta telah dijamin oleh Kerajaan Negeri. Selain itu, LOU memberikan jaminan kepada bank bahawa responden mempunyai keupayaan untuk membayar balik jumlah pinjaman pada setiap masa. Oleh itu, LOU berfungsi sebagai sekuriti untuk perjanjian kemudahan dalam pelbagai cara (lihat perenggan 46).

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(4) Walaupun LOU adalah surat antara Kerajaan Negeri Pulau Pinang dan MOF, ia secara jelas menjamin keseluruhan pinjaman RM100 juta yang diberikan oleh bank kepada responden. LOU daripada Kerajaan Negeri Pulau Pinang menyediakan jaminan yang luar biasa dan jaminan lengkap

untuk pembayaran balik jumlah pinjaman. Kerajaan Negeri memikul tanggungjawab penuh ke atas jumlah pinjaman, dan oleh itu, memastikan agensi di bawah bidang kuasanya, seperti responden, mengekalkan keupayaan kewangan yang kukuh pada setiap masa bagi membolehkan pembayaran balik jumlah pinjaman kepada bank (lihat perenggan 47).

(5) Perjanjian kemudahan itu telah dijamin oleh LOU yang dikeluarkan oleh Kerajaan Negeri kepada MOF. Bank itu ialah GLC Kerajaan Persekutuan, manakala responden adalah entiti Negeri. Oleh itu, hubungan antara bank dan responden tidak semata-mata komersial, tetapi berpandukan dasar Kerajaan. Oleh itu, bukannya sekuriti biasa dalam bentuk gadai janji atau gadaian, surat tawaran yang dikeluarkan oleh bank menyatakan keperluan LOU daripada Kerajaan Negeri, selaras dengan dasar Kerajaan Persekutuan. Ini juga dinyatakan dengan jelas dalam Jadual Ketiga perjanjian kemudahan (lihat perenggan 49).

(6) Memandangkan LOU yang dikeluarkan oleh Kerajaan Negeri merupakan jaminan bagi pinjaman RM100 juta tersebut. HMT telah terkhilaf dari segi undang-undang dalam membuat kesimpulan bahawa 'sekuriti' terhad kepada instrumen yang membentuk bebanan ke atas harta yang boleh dibergantungkan oleh pemberi pinjaman untuk tujuan menjamin pembayaran balik hutang. HMT gagal memahami bahawa perkataan 'sekuriti' dalam perintah peremitan mempunyai makna yang lebih luas di mana ia juga termasuk akujanji dan jaminan yang diberikan oleh pihak ketiga. Oleh itu, memandangkan instrumen pinjaman itu telah dijamin oleh LOU Kerajaan Negeri Pulau Pinang, ia tidak termasuk dalam perintah peremitan (lihat perenggan 50).]

Cases referred to

BASF Services (M) Sdn Bhd v Pemungut Duti Setem [2010] 4 MLJ 596, FC (refd)

Galaxy Energy Technologies Sdn Bhd v Timbalan Pemungut Duti Setem, Malaysia & Anor [2011] 5 MLJ 145; [2011] 5 CLJ 829, CA (refd)

Lim Teck Lee v Commissioner of Stamps [1956] 1 MLJ 135, CA (refd)

Muhibbah Engineering (M) Bhd v Pemungut Duti Setem [2017] 6 MLJ 564; [2017] 10 CLJ 66, CA (distd)

Legislation referred to

Incorporation (State Legislatures Competency) Act 1962 Second Schedule, para 14(1)(d)

Penang Development Corporation Enactment 1971

Stamp Act 1949 ss 4(1), 39, 39(1), 80(2), First Schedule, items 22(1)(b), 27(a)(iii)

Stamp Duty (Remission) Order (No 2) 2012

Appeal from: Originating Summons No KB-24NCvC-97–12 of 2020 (High Court, Sungai Petani)

Editorial Note: The respondents in this case appealed to the Federal Court through Civil Appeal No 01(f)-28–10 of 2023 (K). On 17 September 2024, the Federal Court allowed the appeal with costs of RM50,000. Please refer to the Broad Grounds of Judgment attached to the court ready PDF attachment.

Hazlina Hussain (with Ahmad Isyak Mohd Hassan and Mohamad Asyraf Zakaria) (Inland Revenue Board of Malaysia) for the appellant.
Quah Boon Nee (with Mohd Farid Azahari) (JB Lim & Assoc) for the respondent.

Azizah Nawawi JCA:

[1] This is an appeal against the decision of the learned High Court judge delivered on 30 November 2021 allowing the appeal by the respondent, Penang State Development Corporation pursuant to s 39(1) of the Stamp Act 1949 (Revised 1989) ('the Stamp Act').

THE SALIENT FACTS

[2] The respondent is a corporation established under the Incorporation (State Legislatures Competency) Act 1962 and the Penang Development Corporation Enactment 1971 ('the PDC Enactment'). The respondent is a State entity.

[3] Section 15C of the PDC Enactment stipulates that the respondent cannot apply for any loans except with prior written approval from the Minister of Finance ('MOF'), and the MOF may impose any conditions deemed necessary on such approval.

[4] According to the MOF directive dated 19 November 1999 issued under para 14(1)(d) of the Second Schedule of the Incorporation (State Legislatures Competency) Act 1962 , the State Government must provide an undertaking that it will fully guarantee the loan obtained by a state entity.

[5] The respondent had applied for and had obtained an Islamic Tawarruq banking facility of RM100m ('loan') from Bank Islam Malaysia Bhd ('bank') via a letter of offer dated 6 May 2019. In the said letter of offer, it is clearly specified that the offer is subject to the terms and conditions, including:

> Security
>
> the security provided by the Security Party to the Bank in respect of the obligations and liabilities of the Customer (including but not limited to the payment of the Indebtedness) under and in connection with the Facility and particularized in Section 7 of the First Schedule and any other security for the time being or from

time to time constituting security for the obligations and liabilities (including but not to limited to the payment of the indebtedness) of the Customer under and in connection with the facility.

Condition Precedents:

A. The Customer shall have executed and/or submitted the followings:

...

6) Letter of Undertaking from Penang State Government via Jabatan Kewangan Negeri to Ministry of Finance that the State Government is to be accountable for the RC-I facility of RM100 million with Bank Islam.

[6] Additionally, in the *murabahah* financing agreement, there is also a specific requirement to provide a guarantee to secure the said loan, to be provided by a third party, namely the Penang State Government.

[7] Pursuant to the terms of the letter of offer issued by the bank, the respondent is required to submit a letter of undertaking ('LOU') from the Penang State Government to the MOF stating that the State Government will be responsible for the financing facility offered by the bank.

[8] On 5 July 2019, the Penang State Government through the State Government Executive Council Meeting ('Exco meeting') No 20/2019, which was ratified on 12 July 2019, had agreed to approve the proposal of the loan facility amounting to RM100m from the bank to the respondent.

[9] Following that, a LOU dated 9 August 2019 was sent by the Penang State Finance Department to the MOF stating that the State Government pledges to fully guarantee the loan facility of RM100m from the bank:

Ketua Setiausaha Perbendaharaan Kementerian Kewangan Malaysia

Bahagian Pengurusan Strategik Badan Berkanun

Aras 4, Blok Tengah

Kompleks Kementerian Kewangan No 5,

Persiaran Perdana, Presint 2

62594 PUTRAJAYA

(u.p: Encik Mohd Sakeri bin Abdul Kadir)

Tuan

SURAT AKUJANJI KE ATAS PERMOHONAN MENGENAI KEMUDAHAN PINJAMAN KREDIT TIDAR BERJUMLAH RM100 JUTA DARI BANK ISLAM MALAYSIA BHD OLEH PERBADANAN PEMBANGUNAN PULAU PINANG (PDC)

Dengan segala hormatnya saya merujuk kepada perkara di atas.

2. Adalah dimaklumkan bahawa Kerajaan Negeri Pulau Pinang, melalui Majlis Mesyuarat Kerajaan Negeri (MMK) Bilangan 20/2019 pada 5 Julai 2019 yang disahkan pada 12 Julai 2019 telah bersetuju meluluskan cadangan mengenai Kemudahan Pembiayaan Kredit Tidar berjumlah RM100 Juta daripada Bank Islam Malaysia Bhd oleh Perbadanan Pembangunan Pulau Pinang (PDC).

3. Sehubungan itu, Kerajaan Negeri memberi akujanji untuk bertanngungjawab sepenuhnya ke atas pinjaman Kredit Tidar berjumlah RM100 Juta daripada Bank Islam Malaysia Berhad tersebut.

Sekian, terima kasih.

'CEKAP, AKAUNTABILITI, TELUS'

'BERKHIDMAT UNTUK NEGARA'

Saya yang menjalankan amanah

(DATO' SARUL BAHIYAH BINTI HAJI ABU)

Kewangan Negeri Pulau Pinang

Pengurus Besar

Perbadanan Pembangunan Pulau Pinang No 1 Persiaran Mahsuri

Bandar Bayan Baru

11909 PULAU PINANG

[10] Upon compliance with the terms of the offer letter from the bank, including the issuance LOU dated 9 August 2019 by the Penang State Finance Department, a *murabahah* financing agreement dated 1 September 2020 was signed by the respondent and the bank.

[11] On the same day, the respondent applied for stamp duty remission from the appellant on the *murabahah* financing agreement in accordance with the Stamp Duty (Remission) Order (No 2) 2012 ('the Remission Order 2012').

[12] This application for the remission of stamp duty chargeable was rejected by the appellant.

[13] The respondent however, through their attorney, JB Lim & Associates, submitted further explanation to the appellant via a letter dated 2 September 2020, elucidating as follows:

(a) the financing facility amounting to RM100m is an unsecured financing;

(b) repayment of the financing facility is made in a lump sum; and

(c) the duty imposed on the murabahah financing agreement is in

A accordance with item 22(1)(b) of the First Schedule of the Stamp Act 1949.

B **[14]** After considering the respondent's explanation, the appellant maintained the stance of not allowing the stamp duty remission application requested by the respondent. Therefore, the appellant issued a security estimation notice (*ad valorem* duty) dated 24 September 2020 regarding the *murabahah* financing agreement ('*ad valorem* estimation notice').

C **[15]** The respondent then commenced an appeal under s 39 of the Stamp Act 1949 to the High Court. In its appeal by way of case stated, the respondent sought the following reliefs:

(1) bahawa defendan diarahkan untuk menyatakan dan menandatangani satu kes yang menyatakan soalan-soalan di mana pendapatnya diperlukan dan keputusan yang dibuat olehnya;

(2) bahawa Surat Tawaran daripada Bank Islam Malaysia Berhad [No Syarikat: 198301002944 (98127-X)](Bank Islam) kepada Perbadanan Pembangunan Pulau Pinang (Plaintif) bertarikh 6 Mei 2019 dan Tawarruq Facility Agreement di antara Bank Islam dan Plaintif bertarikh 1 September 2020 (Perjanjian Pembiayaan Tawarruq) layak untuk mendapat peremitan amaun duti setem melebihi 0.1% di bawah Perintah Duti Setem (Peremitan)(No 2) 2012 bagi kemudahan pembiayaan sebanyak RM100,000,000.00;

(3) bahawa sekiranya Perjanjian Pembiayaan Tawarruq layak untuk menuntut peremitan di bawah Perintah Duti Setem (Peremitan)(No 2) 2012, duti setem yang telah terlebih bayar atas Perjanjian Pembiayaan bagi kemudahan pembiayaan sebanyak RM100,000,000.00 dikembalikan/dibayar balik oleh Defendan kepada Plaintif; dan

(4) bahawa rayuan Plaintif di bawah Seksyen 39 Akta Setem 1949 dibenarkan; bahawa kos-kos untuk rayuan ini dibayar oleh Defendan kepada Plaintif.

[16] The only issue for the High Court's determination as stated in the case stated is as follows:

> whether the *tawarruq* facility agreement for the amount of RM100m of which the Penang State Government is giving an undertaking (referred to as guarantee by the defendant) (hereinafter referred to as 'the letter of undertaking') to the Minister of Finance to be fully responsible for the facility amount of RM100m is entitled for the remission of stamp duty under the Stamp Duty (Remission) (No 2) Order 2012 (PU(A) 258/2012).

DECISION OF THE HIGH COURT

[17] On 30 November 2021, the learned judge allowed the respondent's appeal. The learned judge held that the LOU is not a 'security' and the facility agreement is entitled for the remission of stamp duty under the Remission Order. Her Ladyship held as follows:

> 17. *In my view, based on the authority of Muhibbah, it is safe to conclude that in determining whether or not an instrument is a 'security' for the purpose of the Stamp Act, the court should enquire whether the instrument is an encumbrance on property with which the lender can rely on to enforce and to recover the sum loaned under credit facility*. If the answer is in the affirmative, then that instrument is 'security'. Conversely, if the answer is in the negative, that instrument cannot amount to a security under the Stamp Act and, accordingly, the taxpayer is entitled to a remission under the Remission Order.
>
> 18. In the case before me, the letter in dispute was a letter of undertaking, or to use a more appropriate word a letter of assurance, issued by the State Government to the Ministry of Finance in compliance to the latter's letter of approval to PDC. I am unable to see how Bank Islam can rely on this letter of undertaking to secure a repayment of the loan as there is no privity of contract between Bank Islam and/or the Ministry of Finance. The letter of undertaking, therefore, cannot amount to a security for the purpose of the Stamp Act. (Emphasis added.)

OUR FINDINGS

[18] The governing principle is that stamp duty strikes at instruments rather than transactions. This is entrenched in s 4(1) of the Stamp Act 1949 which provides that:

> 4(1) Subject to this Act and subject to the exemptions contained in this Act and in any written law for the time being in force, the several instruments specified in the First Schedule shall, from and after the commencement of this Act, be chargeable with several duties specified in such Schedule.

[19] The above principle is established by the decision of the court in *Lim Teck Lee v Commissioner of Stamps* [1956] 1 MLJ 135 where the Court of Appeal held:

> The fundamental principle is this. The Stamp Act taxes instruments, not transactions. If there are two ways of carrying out a transaction and the parties are content with the simpler, they are entitled to carry it out in that way.

[20] In *Galaxy Energy Technologies Sdn Bhd v Timbalan Pemungut Duti Setem, Malaysia & Anor* [2011] 5 MLJ 145; [2011] 5 CLJ 829, this court held a similar view:

> [19] The cardinal principle of stamp duty is that stamp duty is chargeable on the

instrument and not transactions. As Finley J in *Prudential Assurance Co v Inland Revenue Commissioners* [1935] 1 KB 101 said:

> The rule which must not be forgotten — namely, that under the Stamp Act one stamps, not transactions or anything of that sort, but one stamps instrument.

[21] In the case of *BASF Services (M) Sdn Bhd v Pemungut Duti Setem* [2010] 4 MLJ 596 the Federal Court held that:

> [18] Now that this court has identified the transfer form as the instrument that is chargeable to stamp duty, the next step is to decide on whether the infrastructure fees are part of the consideration of the agreement and hence liable under item 32(a). It is generally acknowledged that the real substance of a transaction may not successfully be appreciated by mere perusal of a document, or by a hurried gauging of the machinery adapted by the parties of the transaction. Only after going through the exercise of construing the [2010] 4 MLJ 596 at 605 document as a whole may the real substance of that transaction be known and thenceforth ascertain the respective parties' rights and obligations, and the correctness of the respondent's adjudication (*Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1 *Pernas Securities Sdn Bhd v The Collector of Stamp Duties* [1976] 2 MLJ 188). CC Gallagher Highmore's *Stamp Laws* (4th Ed) at p 7 authored:
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> General Rules as to Stamp Duties.
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> > In order to determine whether any, and if any what, stamp duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial ... For instance, if a writing were headed by a recital that the parties had agreed to execute the promissory note thereinafter written, yet if in truth the contract set forth was not a promissory note, but an agreement of another character, the stamp duty would be not that of a promissory note, but of the agreement. The question therefore, stamp or no stamp, and if a stamp to what amount, is to be determined upon the real and true character and meaning of the writing. It is sufficient to refer to the case of *Rex v Inhabitants of Ridgwell* [1827] 6 B & C 665, to establish this proposition.
>
> [19] In *Stanway Limited v Collector of Stamp Duties, Ipoh* [1931–32] FMSLR 239, Throne Ag CJ said:
>
> > Now I would here remark that under the provisions of the Stamp Enactment the parties to an instrument become liable to pay duty upon the instrument made between them, having regard to the effect of the instrument, and they cannot avoid payment of the proper duty by using a form of instrument to carry into effect the transaction which, though in name falls within one category, by its effect into another.
>
> [20] In *Tan Kay Thye & Ors v Commissioner of Stamp Duties* [1991] 3 MLJ 150 likewise echoed the sentiments of CC Gallagher's Highmore's *Stamp Laws* when the case of *Limmer Asphalte Paving Company Limited v Commissioners of Inland Revenue* (1872) LR 7 Exch 211 was quoted by the court to establish the point that what parties called a document was not important. In the current appeal, the fact that the

agreement carries the title 'Purchase, Sale, Development and Infrastructure Agreement' and implying three possible separate agreements, is not decisive. It is the effect and substance of the agreement that counts (*Commissioners of Inland Revenue v Glasgow and South-Western Railway Company* (1887) 12 App Cas 315 *The Law of Stamps on Deeds and other Instruments* EN Alpe (12th Ed)).

[22] From the above cases, for the court to determine whether the stamp duty levied on an instrument is correctly imposed by the collector, the following matters must be taken into account before the court could come to a finding:

(a) the name, title, label or description given to the instrument/document (label) by the parties in question is not conclusive. The court is not bound by the label and may go behind the label to determine the true nature of the instrument/document;

(b) the court has to construe the instrument/document as a whole;

(c) in addition to the instrument/document, the court may consider all relevant documents (relevant documents) so as to ascertain the true nature of the instrument/document;

(d) in deciding the true nature of the instrument/document, the court may consider all relevant circumstances regarding the instrument/document (relevant circumstances); and

(e) in considering the instrument/document, relevant documents and relevant circumstances, the court determines the following matters:

(i) what is the true nature of the rights and obligations of the parties?

(ii) what is the effect of the instrument/document, relevant documents and relevant circumstances? and

(iii) what is the substance of the instrument/document?

[23] It is common ground that any facility agreement is subject to stamp duty pursuant to item 22(1)(b) of the First Schedule to the Stamp Act 1949 read with item 27(a)(iii), which reads as follows:

Item	Description of Instrument	Proper Stamp Duty
22	BOND, COVENANT, LOAN, SERVICES, EQUIPMENT LEASE AGREEMENT OR INSTRUMENT of any kind whatsoever:	
	(1)(a) ... not relevant ...	RM1.00
	(b) for any sum or sums of money, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack	The same ad valorem duty as a charge or mortgage for such total amount.

Item	Description of Instrument	Proper Stamp Duty
27	CHARGE OR MORTGAGE, AGREEMENT FOR A CHARGE OR MORTGAGE (including that under the Syariah), BOND, COVENANT, DEBENTURE (not being a marketable security) BILL OF SALE by way of security and WARRANT OF ATTORNEY to confess and enter up judgment: (a) Being the only or principal or primary security (other than an equitable mortgage or an assignment of receivables or the kind mentioned in paragraph (d)) for the payment or repayment of money — (i) ... (ii) ... (iii) in any other case — For each RM1,000 or part thereof	RM5

[24] However, the respondent may apply for a remission based on a Remission Order issued by the Minister under s 80(2) of the Stamp Act 1949, the Stamp Duty (Remission) (No 2) Order 2012 (PU(A) 258/2012) which provides as follows:

> 2. The amount of stamp duty that is chargeable under subsubitem 22(1)(b) of the First Schedule to the Act upon a loan agreement or loan instrument without security for any sums or sums of money repayable on demand or in single bullet repayment under that subsubitem which is in excess of zero point one per cent (0.1%) is remitted.

[25] Under the Remission Order, the instrument which is entitled for a remission is an instrument which fulfilled the following criteria:

(a) loan agreement or loan instrument without security repayable on demand; or

(b) loan agreement or loan instrument without security repayable in single bullet repayment.

[26] It is not in dispute that the respondent's facility agreement is secured by the LOU from Penang State Government as provided in the conditions precedent of the letter of offer dated 6 May 2019 and para (D)(1) of the Third Schedule to the facility agreement:

> Third Schedule
>
> (D) Others

(1) Letter of Undertaking from Penang State Government via Jabatan Kewangan Negeri to Ministry of Finance that the State Government is to be accountable for the Facility of RM100,000,000.00 with the Bank.

...

(4) any other Conditional Precedents as stated in the letter of offer dated 6 May 2019.

[27] As a condition precedent to the facility agreement, the Penang State Government through the Jabatan Kewangan Negeri issued the LOU dated 9 August 2019, where the Penang State Government had given an assurance to the MOF that the Penang State Government will be accountable for the loan facility amounting to RM100m granted by the Bank Islam. In the said letter, the Penang State Government clearly stated that:

3. Sehubungan itu, Kerajaan Negeri memberi akujanji untuk bertanggungjawab sepenuhnya ke atas Pinjaman Kredit Tidar berjumlah RM100 juta daripada Bank Islam Malaysia Berhad tersebut.

[28] However, the respondent took the position that the LOU by the Penang State Government addressed to the MOF dated 9 August 2020 is not a security because the LOU is only between the Penang State Government and the Federal Government and the bank is not privy to the State LOU. Further, it was contended that the LOU is merely a 'letter of compliance' or a 'letter of assurance' to the MOF that the State Government is responsible for the loan. Further, it was also contended that the LOU did not create any charge, pledge or assign any assets as a collateral for the Facility.

[29] The respondent relied on a decision of this court in *Muhibbah Engineering (M) Bhd v Pemungut Duti Setem* [2017] 6 MLJ 564; [2017] 10 CLJ 66, which was accepted by the learned judge that in determining whether or not an instrument is a 'security' for the purpose of the Stamp Act, the court should enquire whether the instrument is an encumbrance on property with which the lender can rely on to enforce and to recover the sum loaned under credit facility. If the answer is in the affirmative, then that instrument is a 'security'. Conversely, if the answer is in the negative, that instrument cannot amount to a security under the Stamp Act.

[30] The learned judge held that LOU issued by the State is more like a letter of assurance, and therefore the bank cannot rely on this LOU to ensure repayment of the loan, given the absence of a direct contractual relationship between the bank and either the State Government or the MOF. Consequently, the letter of undertaking cannot be considered a form of security under the Stamp Act.

[31] The learned judge relied on the following paragraphs in *Muhibbah Engineering (M) Bhd v Pemungut Duti Setem* as the basis of her decision:

> [60] Coming back to the word 'security', Lexis Nexis publication of *Words, Phrases and Maxims — Legally and Judicially Defined* (Vol 13) defines it to mean as follows:
>
> *A security is an encumbrance, vested in a creditor, over the property of his debtor, for the purpose of securing the repayment of a debt. It is a right in the property of another, which enables a person, who is entitled to receive a definite value from that another in default of so receiving it, to realise it from that property. The purpose of a security is to ensure, of [sic] facilitate, the fulfilment, or enjoyment, of some other right vested in its owner. Securities may be classified into:*
>
> (i) mortgages;
>
> (ii) pawns;
>
> (iii) floating charges;
>
> (iv) lien.
>
> This word has a variety of meaning:
>
> (i) the general name for all mortgages, charges, debentures, etc, whereby repayment of money is assured or secured;
>
> (ii) *any document by which any claim may be enforced.*
>
> [61] Going by this definition, the negative pledge by the appellant is certainly not a security as it is not an encumbrance vested in Maybank over the properties of the appellant, nor does it vest in Maybank a right over the properties which enables Maybank to realise the loan amount from the properties in the event of default by the appellant. Being a mere pledge not to encumber properties and nothing more, there is no property for the respondent to realise in the event of default.
>
> [62] The true legal effect of the negative pledge given by the appellant is that it merely created an obligation not to encumber. It does not provide an obligation to repay any sum or sums of money in any way whatsoever. This is to be contrasted with that of a charge, mortgage or guarantee. In these instruments, upon the occurrence of an event of default, the sums of money become due and payable and failure to pay will expose the assets encumbered to foreclosure proceedings to redeem the loan sums.
>
> [63] We agree with learned counsel for the appellant that in the event of default by the appellant, Maybank will be considered as an unsecured creditor and will be equal in right of payment ie, pari passu vis-a-vis the other creditors. It is therefore incorrect for the learned judge to hold the view that the negative pledge by the appellant assured or guaranteed Maybank of payment in the event of default.
>
> [64] It is an undisputed fact that the appellant did not pledge any tangible asset or property as security that can be disposed of, sold or converted to cash to pay for the facility. The learned judge however did not consider this as negativing the element of 'security' in the facility agreement ...

[32] However, we take a different view. We are of the considered opinion that the factual matrix of the above case is different from the present appeal. In *Muhibbah Engineering (M) Bhd v Pemungut Duti Setem*, the issue is whether a negative pledge in a banking facility agreement was a 'security' within the meaning of para 2 of the Remission Order. Under the facility agreement in that case, the security documents included the negative pledge given by the appellant, which was in the following terms:

> NOW IN CONSIDERATION OF THE FOREGOING, WE HEREBY COVENANT AND UNDERTAKE that so long as any part of the facility, profit, dividend, income, yield and any other fees, commission, cost or other charges relating thereto and any monies secured herein shall remain outstanding, we shall NOT without your written consent:
>
> (a) create or permit to arise or subsist any encumbrance, mortgage, charge, pledge, lien, right of retention, right of set-off or any other security interest on the whole or any part of our present or future assets other than:
>
> (i) liens arising in the ordinary course of business or by operation of law; and
>
> (ii) security interests existing at the date hereof provided the same has been disclosed to you prior to the date hereof and subject to the amount outstanding and secured thereby at all times and at any time hereafter not exceeding the amount so disclosed at the date hereof ...

[33] The court then held that the negative pledge by the borrower is certainly not a security as it is not an encumbrance vested in Maybank over the properties of the borrower, nor does it vest in Maybank a right over the properties which enables Maybank to realise the loan amount from the properties in the event of default by the appellant.

[34] In the context of a normal commercial transaction between a bank and its borrower, the loan is normally secured by a security, normally an encumbrance over the properties of the borrower, as the bank would not release its monies without any security.

[35] However, we are of the considered opinion that this court in *Muhibbah Engineering (M) Bhd v Pemungut Duti Setem*, did not seek to apply a restrictive definition to the word security. This can be seen from paras [65] and [66] of the case, where the court had referred to the trial judge's reference to dictionary meaning of the word security:

> [65] *The Concise Oxford Dictionary* (9th Ed) which the learned judge referred to in the first paragraph of the above passages gives five different meanings to the word 'security', as follows:
>
> 1. a secure condition or feeling; 2. a thing that guards or guarantees; 3. (a) the safety of a state, company etc, against espionage, theft, or other danger; (b) an organization for ensuring this; *4. a thing deposited or pledged as a guarantee of the*

> *fulfilment of an undertaking or the payment of a loan, to be forfeited in case of default;* 5. (often in pl) a certificate attesting credit or ownership of stock, bonds, etc. (Emphasis added.)
>
> [66] Of the five meanings, *only meanings 2 and 4 are relevant, but even then they speak of 'a thing' that guards or guarantees, or deposited or pledged as a guarantee of the fulfilment of an undertaking or the payment of a loan, to be forfeited in case of default*. (Emphasis added.)

[36] Applying the dictionary definitions to the facts of the case, the court then held in para [67] of the judgment that a negative pledge 'cannot by any stretch of the imagination refer to 'a thing that guards or guarantees', nor is it 'a thing deposited or pledged as a guarantee of the fulfilment of an undertaking or the payment of a loan, to be forfeited in case of default.' There was nothing deposited and there is nothing to forfeit ...'.

[37] The court then held that the negative pledge will not help Maybank in any way towards recovery of the debt. The negative pledge does not create such obligation because it is merely a contractual obligation not to charge or encumber any asset and not an obligation to repay any sum or sums of money on demand. And in the event of default, nothing arises from the terms of the negative pledge and it does not make the sum or sums of money repayable on demand. As such, there is no 'security' in the form of 'a guarantee of the fulfilment of an undertaking or the payment of the loan' (see paras 74 and 75).

[38] In the present appeal, we are of the considered opinion that the word 'security' must be given a wide meaning. In Stroud's *Judicial Dictionary of Words and Phrases* (7th Ed):

> A 'security', speaking generally, is anything that makes the money more assured in its payment or more readily recoverable ...

Black's *Law Dictionary* (10th Ed) defines security as:

> Collateral given or pledged to guarantee the fulfilment of an obligation; esp., the assurance that a creditor will be repaid (usu. With interest) any money or credit extended to a debtor.

[39] In the facility agreement itself, 'security' is defined as:

> the security provided by the Security Party to the Bank in respect of the obligations and liabilities of the Customer (including but not limited to the payment of the Indebtedness) under and in connection with the Facility and particularized in Section 7 of the First Schedule and any other security for the time being or from time to time constituting security for the obligations and liabilities (including but not to limited to the payment of the indebtedness) of the Customer under and in connection with the facility.

[40] However, under the Third Schedule — the conditions precedent (which is to be taken and construed as an integral part of this agreement), para D provides that the security for the loan was the LOU from Penang State Government via Jabatan Kewangan Negeri to Ministry of Finance that the State Government is to be accountable for the facility of RM100m with the bank.

[41] Therefore, despite the respondent's reliance on both the letter of offer and the facilities agreement stating 'Security: Nil', we must read both documents as a whole. Having considered both documents as a whole, we find that the conditions precedent of the letter of offer dated 6 May 2019 and para (D)(1) of the Third Schedule to the facility agreement clearly stated the requirement of the LOU issued by Penang State Government via the Jabatan Kewangan Negeri to MOF that the State Government is to be accountable for the Facility of RM100m with the bank.

[42] Added to that, this court in *Muhibbah Engineering (M) Bhd v Pemungut Duti Setem* also held that for the purpose of the term 'security' in the Remission Order, the court should not be concerned with the loan instrument, that is, the facility agreement itself, but rather the nature of the negative pledge. This is because the words 'without security' in the Remission Order come after the words 'loan agreement or loan instrument'. This can only be construed as to mean a security that is separate from and not part of the loan instrument itself. It refers to a separate security instrument. In para [24] of the judgment, the court added:

> [24] *The legislative intent clearly is for the security to be collateral or secondary to that of the loan agreement or loan instrument*. To construe otherwise would be to render the Remission Order redundant and will not be applicable in any circumstance as the loan agreement or loan instrument would then, by itself, constitute 'security' in any event and in every case. In our view, that construction will defeat the object of the Remission Order rather than to put its object into effect.
>
> [25] We agree with learned counsel for the appellant that the loan agreement is not the operative instrument for the purposes of the Remission Order because the loan agreement is already subject to stamp duty and is the main instrument falling under sub-sub item 22(1)(b) of the First Schedule to the Stamp Act. *What the Remission Order is concerned with is whether or not the loan agreement or loan instrument is supported by another instrument that creates an obligation 'for any sum or sums of money repayable on demand or in single bullet repayment'*. (Emphasis added.)

[43] In paras [71] and [72] of the judgment, the court held that for the purposes of the Remission Order, it is important to reiterated the importance of an instrument independent of the facility agreement which secures an obligation to secure a sum or sums of money on demand. Therefore, the court held that the matter of concern for the Remission Order is not the loan

A agreement or loan instrument itself but whether there is in existence another instrument that creates an obligation to pay a sum or sums of money on demand or in a single bullet payment. It is only where such instrument exists that entitlement to a remission of stamp duty is excluded by the Remission Order.

B

[44] Therefore for the purposes of the Remission Order, there must be a separate instrument that creates an obligation 'for any sum or sums of money repayable on demand or in single bullet repayment'. And the intent and purpose of that separate instrument must be ascertained whether it falls within C the ambit of the Remission Order.

[45] We are therefore of the considered opinion that the LOU issued by the Penang State Government to the MOF on 9 August 2019 is a separate instrument that serves as a clear assurance that the State Government will take D full responsibility for the loan amount.

[46] The intent and purpose of the LOU is the Penang State Government's undertaking to be responsible for the loan and it explicitly secures the E repayment of the loan facility to the bank. As a result of this assurance provided to the MOF, the payment of the RM100m facility is guaranteed by the State Government. Additionally, the LOU provides a guarantee to the bank that the respondent has the capability to repay the loan amount at all times. Thus, the LOU serves as security for the facility agreement in multiple ways.

F

[47] Even though the LOU is a letter between the Penang State Government and the MOF, it explicitly guarantees the entire RM100m loan provided by the bank to the respondent. The LOU from the Penang State Government provides an exceptional security and a complete assurance for the repayment of G the loan amount. The State Government bears full responsibility for the loan amount, and as such, ensures that agencies under its jurisdiction, such as the respondent, maintain strong financial capability at all times to enable the repayment of the loan amount to the bank.

H **[48]** Parties have also conceded that the issue of enforcement is not the issue for consideration here. Thus, as to how the security, in the nature of the LOU is to be enforced, is not a consideration in this appeal.

[49] In the present appeal, the facility agreement is secured by the LOU I issued by the State Government to the MOF. The bank is a Federal Government GLC, whilst the respondent is a State entity. Hence, the relationship between the bank and the respondent is not strictly commercial, but are guided by government policies. Therefore, instead of the usual security in the nature of mortgages or charges, the letter of offer issued by the bank

specified the requirement of a LOU from the State Government, in compliance with the Federal Government policy. This is also clearly stated in the Third Schedule of the facilities agreement.

CONCLUSION

[50] For the aforesaid reasons, we find merits in the appeal as the LOU issued by the State Government constitutes a security for the said RM100m loan. We are of the considered opinion that the learned judge has erred in law when she concluded that a 'security' is limited to instruments which form an encumbrance on property which the lender can rely on for the purpose of securing the repayment of a debt. The learned judge failed to appreciate that the word 'security' in the Remission Order has a wider meaning where it also includes the undertaking and guarantee provided by a third party. Therefore, since the loan instrument is secured by the Penang State Government's LOU, it does not fall within the Remission Order. The appeal is allowed with costs and the decision of the learned High Court judge is set aside.

Appeal allowed.

Reported by K Selvaraju

Civil Appeal No. 01(f)-28-10/2023 (K)

Perbadanan Pembangunan Pulau Pinang v Pemungut Duti Setem, Malaysia

Quorum:
Justice Nallini Pathmanathan, FCJ
Justice Rhodzariah Bujang, FCJ
Justice Abdul Karim Abdul Jalil, FCJ

Broad Grounds

1. We have read and considered the appeal records, the written and oral submissions of counsel and having done so are of the unanimous view that the appeal should be and is hereby allowed. Our reasons for so concluding are set out below.

2. The primary issue before us is whether a Tawarruq facility agreement ('loan agreement') offered to the Appellant, the Penang Development Corporation falls within a Remission Order which remits payment of stamp duty for loan instrument without security, or sums of money repayable on demand. It is the former which is the subject matter of this appeal.

3. The contention of the Appellant is that there is no security. The Revenue contends otherwise namely that a Letter of Undertaking given by the State Government to the Minister of Finance comprises security, thereby disentitling the Appellant from the remission.

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Facts

4. The relevant facts are that:

(a) The Penang Development Corporation ('PDC') applied for a loan from Bank Islam which was approved; it was offered a loan of RM100 million. The letter of offer stipulates clearly that the security is "nil" as does the Tawarruq based loan facility agreement.

(b) However in order for PDC to be granted that loan there are several statutory obligations, which it had to fulfil under other governance based statutes relating to State Development Corporations. Parliament has expressly provided that in order for PDC to take out a loan from a financial institution, the Minister of Finance's approval is a mandatory requirement. The Minister of Finance may impose such conditions as he deems fit for granting such approval;

(c) In the instant case, the Minister of Finance imposed the condition that the State Authority, i.e. the PSA has to furnish an undertaking in the form of a letter of undertaking ('LOU') to the Minister of Finance that the State Authority is fully responsible for the loan. It is a condition that has to be complied with prior to any procuring of a loan;

(d) This is a requirement under the provisions of the Incorporation (State Legislatures Competency) Act 1962 ('ISLCA') and the Penang Development Corporation Enactment 1971 ('PDCE')

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which are the statutory provisions requiring the PDC to obtain the prior written consent of the Minister of Finance under section 15C(2)(d). The purpose and object of the ISLCA and the PDCE are completely different from that of the Stamp Act ('SA') which is the subject matter of consideration here. In order to ascertain the purpose and object of this statutory requirement for a LOU, it is necessary to study the purpose and object of the ISLCA and the PDCE pursuant to section 17 of the Interpretation Acts;

(e) A reading of the Hansard on the PDCE which was amended to meet the amendments of the ISLCA stipulate amongst others, that the purpose and object of the Act is to stipulate specifically the powers of the Minister of Finance in relation to state development corporations namely to control and supervise the financial matters of these development corporations and to systematise matters relating to the auditing and financial accounts of these development corporations. To this end, the Minister's permission/consent is required in respect of financial matters including loans, and the Minister of Finance is entitled to impose such conditions as he sees fit in relation to such matters;

(f) What is clear from a consideration of those statutory provisions is that the permission of the Minister of Finance is a pre-requisite to the furnishing of a loan – albeit entry into a loan agreement or disbursement of the monies;

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(g) Can it be said that those pre-requisites under the PDCE here termed a Condition Precedent under the loan agreement between the Bank and PDC, comprise a security for the provision of the loan between these latter two entities? The answer to our minds is no;

(h) Why is that? Because a condition precedent or the requirement that the permission of the Minister of Finance is required and that the Minister of Finance can attach any conditions he sees fit in order to give such consent relates to separate and different legislation and has nothing to do with the SA;

(i) Far less can the condition precedent then be imported into the SA in order to construe or interpret the requirements of the SA and more significantly the Remission Order – this is trite law, namely that the statutory provisions of another unrelated statute cannot be used to interpret or determine whether the loan agreement is with or without security;

(j) By doing so, as the Court of Appeal did, there is a conflation with:

Firstly, the purpose and object of the ISLCA and the PDCE with the SA;

Secondly, the use of requirements and words in other statutes cannot be utilised under the SA albeit the Act itself or the

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Remission Order unless those words or content are *pari materia* – this is not the case here;

Thirdly, the provision of the letter of undertaking is to meet the requirements of those Acts and not those of the loan agreement – in other words if there was no such statutory requirement under those Acts – the PDC would have obtained the loan without the need for fulfilment of the CP, meaning in turn that no LOU would have been furnished to the MOF;

Fourthly, it is simply incorrect to apply statutory requirements existing for different purposes and objects, to the Remission Order passed under the SA, to determine whether the loan granted to PDC is with or without security.

(k) So it is not simply a question of the construction of the term 'security' but more an issue of whether you can import statutory requirements from separate and unrelated legislation in construing the RO, and more importantly apply those statutory requirements to the remission under the RO to preclude and prohibit its application;

(l) If this can be done then it would become permissible for CPs reflecting safeguards from other unrelated statutes to be used in aid of construction of loan agreements relating to whether a particular loan agreement attracts the levy of stamp duty or falls within an exemption or remission order. That cannot be correct;

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(m) The situation might well have been different if it was a condition precedent to the grant of a loan to PDC that security in the form of a letter of undertaking from the State Government was to be given to the Bank. That would comprise security to ensure repayment of the loan sum;

(n) **The law in this respect is not novel.** When interpreting terms in the SA, parties should avoid importing definitions from other statutes unless there is a clear legislative directive to do so.

Importing Purpose and Object of a Different Statute to Construe the Stamp Act

(1) Overview

5. The SA is primarily a fiscal statute aimed at raising revenue for the government, and its interpretation is guided by its specific objectives. It is a positive law and to be construed in accordance with its plain terms.

6. **The Act must be interpreted strictly, focusing on its specific provisions and the revenue objectives it aims to achieve.**

(2) Importing Definitions and Provisions

7. **Definitions or provisions from statutes with different objects and purposes should not be mechanically imported into fiscal statutes like the SA.**

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8. **The rationale is that each statute is designed with its own objectives, and applying definitions from one to another can lead to misinterpretation and unintended consequences**

(3) Purposive Approach

9. **While a purposive approach to statutory interpretation is encouraged, it should be confined to the statute in question. Section 17A of the Interpretation Acts emphasizes that a construction promoting the purpose of the Act should be preferred, but this does not extend to importing purposes from unrelated statutes (see Pandit Ram Narain vs The State Of Uttar Pradesh And others AIR 1957 SC 18, p.23 and Brown v Bennett (No 2) [2002] 1 WLR 713 (Ch), Neuberger J at paragraph [40]).**

10. **The courts have consistently held that the purpose of the SA is to ensure compliance with revenue collection, and this purpose should guide its interpretation without reference to other statutes**

11. We conclude that importing the purpose and object of a different statute to construe the SA is not permissible.

12. In conclusion, while definitions from other statutes may provide some insight, they should not be used as authoritative guides for interpreting terms in the SA due to the distinct legislative contexts and purposes involved. This case involves an interplay between the statutory requirements under the ISLCA and the PDC as well as the SA and the RO. They are separate and distinct pieces of legislation.

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The statutory requirements in the ISLCA and the PDCE cannot be imported into the SA and the RO in order to "find" a security which falls within the terms of the loan agreement, such that the provisions of the RO become inapplicable. Neither can the requirement for a LOU/security under those Acts be viewed as equivalent to a "security" within the context of the SA or the RO. The Court of Appeal, with great respect, erred in so construing the law.

13. In these circumstances we hold that the LOU does not comprise security for the loan agreement. Therefore the Appellant has established that the loan agreement does not have security and accordingly, qualifies for remission within the terms of the Remission Order.

14. We turn to the questions of law:

Question 1:
Whether a letter, document or instrument exchanged by and between parties other than a borrower and a lender can impact the incidence of stamp duty on a loan instrument executed by such borrower and such lender?

Answer: It is too general. We decline to answer the same.

Question 2:
Whether in determining the meaning of the words "loan without security" in the said Remission Order, a Letter of Undertaking issued by the State Government of Penang to the MoF (and not to the lender/creditor) constitutes "security"?

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Answer: No.

Question 3:

Whether an undertaking to which both the borrower and lender were not privy would nevertheless be considered as a “security” within the meaning of the said Remission Order?

Answer: No.

Question 4:

Whether the Bahasa Malaysia version of the said Remission Order which uses the words “*pinjaman tanpa cagaran*” are capable of being interpreted as a “loan without collateral” in contradistinction to the English language version of the said Remission Order which uses the words “loan without security” and that, consequently, a letter of undertaking would not constitute “*cagaran*” or “security” within the said Remission Order?

Answer: We decline to answer.

Question 5:

On the interpretation of the words “loan without security” in the said Remission Order, whether the word “security” should be interpreted in the context of insolvency laws or in a some other wider or narrower context and, if so, the appropriate context that should be applicable in the case of the said Remission Order?

Answer: The term ‘security’ should be interpreted in accordance with the Stamp Act.

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Question 6:

Whether the words in the said Remission Order should be interpreted in accordance with the principle in National Land Finance Co-operative Society Ltd v. Director General of inland Revenue [1994] 1 MLJ 99, Exxon Chemical (M) Sdn Bhd v. Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428 and Premium Vegetable Oils Sdn Bhd v Palm Oil Research and Development Board Malaysia & Anor [2002] 4 MLJ 552 that ambiguity in tax legislation should be read in favour of taxpayers and not against them?

Answer: The law as stated in the cases cited in that question remain good law.

Question 7:

Does the Collector of Stamp Duties have the power to disregard the decision/condition (imposed vide paragraph 3(iv) of MoF's letter dated 22.1.2020) of the MoF (being the same Minister identified in the Stamp Act 1949 as having the authority and purview over the Collector and the Act) that the approval of MoF should not result in any financial implications to the Applicant and, consequently, disapply the Remission Order?

Answer: We decline to answer.

15. The appeal is allowed with costs of RM50,000-00 to the Appellant.

Date: 17 September 2024

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